IN THE HIGH COURT OF JUDICATURE OF BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1122 OF 2005
IN
EXECUTION APPLICATION ST.NO.330 OF 2005
IN
SUMMARY SUIT NO.1791 OF 2002

M/s. G.M.Breweries Ltd. ..Plaintiffs.

V/s.

M/s. Shreenath Developers & Anr. ..Defendants.

And

Mrs. Jyotsna Nitin Mehta. ..Respondent.

AND

CHAMBER SUMMONS NO.81 OF 2005
IN
EXECUTION APPLICATION NO.183 OF 2004
IN
SUMMARY SUIT NO.1510 OF 2002

M/s. G.M.Breweries Ltd. ..Plaintiffs.

V/s.

M/s. Siddhivinayak Builders & Anr. ..Defendants.

And

Mrs. Jyotsna Nitin Mehta. ..Respondent.

Mr.F.Divitre with Chetan Kapadia i/b O.A. Das for Judgment Creditor and applicant in chamber summons No.81/2005 and 1122/2005.

Mr. J.P.Sen with Priyadarshan Shah for applicant in chamber summons No.1122 of 2005 and respondent No.3 in Chamber summons No.81 of 2005.

CORAM: A.M.KHANWILKAR,J
DATE : AUGUST 29, 2005.

P.C. :

1. This order will dispose of the two chamber summonses. The chamber summons No.81 of 2005 has been filed by the plaintiffs seeking leave under order XXI Rule 50 of the Code of Civil Procedure to execute Decree against the Respondent Jyotsna Nitin Mehta, a partner of M/s. Shreenath Developers, Defendant No.1 in Suit No.1791 of 2002 in which Common Consent Decree has been passed and for further relief of permitting amendment of the execution application and warrant of attachment. In view of the technical objection raised on behalf of the respondent, the plaintiffs have filed another chamber summons being Chamber Summons No.1122 of 2005 in the execution application arising out of Summary Suit No.1791 of 2002. By consent of the parties, the said chamber summons is taken on board and heard alongwith Chamber Summons No.81 of 2005. Counsel for the respondent states that the pleadings filed by the respondent in the present chamber summons No.81 of 2005 be treated as having been filed in Chamber Summons No.1122 of 2005. That request is accepted.

2. Accordingly, both the chamber summonses are heard and are being disposed of together. Broad facts for deciding point in issue that arises for consideration in both the chamber summonses are that,

in all five suits are filed by the plaintiffs against the defendants named in the respective suits. Husband of respondent has been named as defendant in three of these suits. It is common ground that all the defendants are sister concerns. In the five Summary Suits filed by the plaintiffs, Common Consent Terms were drawn by the parties and parties agreed for disposal of all the suits on the basis of said common consent terms. The consent terms were handed over to Court and were accepted and all the five suits came to be disposed of on 11th December, 2003. Under the said Consent Terms, defendants in all the five suits "jointly and severally" agreed to pay sum of Rs.4,03,00,000/- to fully satisfy the decree. As the payment was not made as per the terms agreed between the parties referred to in the Consent Terms, the plaintiffs filed execution application. In the execution application, the plaintiffs have now taken out the present application for leave to proceed against the respondent. It is now learnt that respondent is one of the partner of Shreenath Developers, registered partnership firm named as defendant in summary suit No.1791 of 2002. Accordingly, the plaintiffs contend that plaintiffs are entitled to proceed against the respondent, who is jointly and severally liable in terms of the

Consent Terms signed by the defendants including the said Shreenath Developers Partnership firm.

3. The other relevant fact that requires to be noted is that on the date when the said transaction in respect of Suit No.1791 of 2002 was entered into, the respondent was partner of Shreenath Developers. It is also not in dispute that when the demand notice was issued by the plaintiffs, sometime in 1996-97, the respondent was partner in the said firm.

4. It is however, the case of the respondent that she has resigned from the partnership firm on 1st April, 2001, whereas the decree on the basis of the consent terms came to be passed on 11th December, 2003. On these facts, the request for granting leave under Order XXI Rule 50 of C.P.Code is resisted by the respondent on the argument that the respondent cannot be made liable in respect of the Decree, which was passed in view of the Consent Terms executed between the parties. The respondent was not the signatory to the Consent Terms nor partner of the firm at the relevant time. Relying on section 19 of the Partnership Act, it is contended that implied authority in other partners to require the respondent to admit any liability does not exist. If it is so,

Consent Terms signed by the other partners of Shreenath Developers cannot be the basis to proceed against the respondent. It is also contended that claim amount in Suit No.1791 of 2002 was in the sum of Rs.2,43,33,000/-, whereas, if the request of the plaintiff in the present proceedings is to be accepted, it would result in a situation where the respondent will be made liable for the decree or the suit claim against the firm of which respondent was neither the partner nor was party to those suits.

5. Having considered the rival submissions and going through the pleadings on record, as mentioned earlier, it is not in dispute that when the said transaction in respect of the Summary Suit No.1791 of 2002 was effected, the respondent was partner in Shreenath Developers. She continued to be partner even on the date on which suit notice or demand notice was issued by the plaintiffs. According to the plaintiffs, the respondent continues to be partner in Shreenath Developers. This stand is taken on the basis of inspection taken by the plaintiffs of the records of the Registrar of Firms where there is no entry in the Register to support the stand that the respondent has retired or resigned from the Shreenath Developers, partnership firm on 1st April,

2001. This position is stated on affidavit by plaintiff which fact has not been countered by the respondent. In other words, in law, it will have to be assumed that respondent continues to be partner of Shreenath Developers, which firm was defendant in Suit No.1791 of 2002. Besides, I find substance in the argument canvassed on behalf of the plaintiffs that there is nothing on record to even remotely suggest that public notice with regard to the retirement of the respondent from the partnership firm Shreenath Developers has been published. No such assertion has been made in the affidavit filed on behalf of the respondent before this court nor any document has been produced stating that such public notice has been issued. If it is so, in view of the express provisions in section 32 of Indian Partnership Act, it follows that it will have to be assumed that respondent continues to be partner of Shreenath Developers and would be liable to all actions against the firm, if resorted by the third party. Viewed in this perspective, I have no hesitation in taking the view that the respondent continues to be partner of the Shreenath Developers.

6. Assuming that the stand taken on behalf of the respondent that she has resigned on 1st April,

2001, was to be accepted, even then there is no substance in the argument canvassed on behalf of the respondent that she can not be made liable in respect of the decree passed on 11th December, 2003. The legal position has been considered by the Division Bench of this court in the case of **Rana Harkishandas Lallubhai V/s. Rana Gulabdas Kalyandas & Anr.,reported** in **AIR 1956 Bombay 513.** In paragraph 4 of the said decision, while considering similar argument, the Court observed as follows:

> "It would be futile to hold an enquiry under sub-r.(2) of R.50 concerning points which, if found in favour of the opponent, may tend to impair the validity of the decree itself. If the property of the partnership would always remain liable for execution, there would be no point in allowing a point to be raised in these proceedings which, if found in favour of the opponents, may tend to make the decree itself invalid and thus affect its executablity.
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> Prima facie, therefore, the pleas which can be taken in the present proceedings should not touch the validity of the decree against the firm and would not be allowed to affect the decree-holder's right to take steps in execution as mentioned in R.50, sub-r.(1)
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> This sub-rule deals with cases where the decree-holder claims to execute a decree passed against the firm and wants to proceed against a person who has not been impleaded as a partner expressly during the course of the suit, and the basis for proceeding against such a person set out by the decree-holder is that the said person was a partner in the firm.

> Proceedings under sub-r.(2) thus begin with the allegation made by the decree-holder that the person against whom he wants to proceed is liable for the decree passed against the firm because the said person was a partner in the firm. That is the basis and the foundation of his claim to proceed against him in execution. Such a person is sought to be made liable solely on the ground that he was a partner and the enquiry becomes necessary in such proceedings where, when the person is served with a summons of these proceedings, he disputes his liability.
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> In our opinion, when sub-r.(2) refers to case where such liability is disputed, the expression "such liability" in the context means liability as a partner. The person served with a summons denies the allegation made by the decree-holder that he was a partner of the firm and it is on this denial that the issue arises between the parties and the issue inevitably would always be whether such a person was a partner of the firm or not.
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> As soon as it is found that the person was a partner of the firm, the decree would immediately be executed against him. He would then become a judgment-debtor and it would not be open to him to raise any further contentions against the validity or the executability of the decree which may not be open to the persons mentioned in sub-r.(1).
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> In a sense, the position of a person who is found to have been a partner in the proceedings taken under R.50, sub-r.(2) would be exactly similar to the position of persons mentioned in cls.(b) and (c) of sub-r.(1). It is only such pleas as these latter classes of persons can take in execution proceedings which would be open to the person who is found to be a partner in the enquiry under sub-r.(2).

In paragraph-5 the Division Bench has observed as follows :

> (5) If the appellants were allowed to take any pleas in addition to the plea that they were not partners, it would obviously lead to unreasonable, if not absurd, results. One of the points which Mr. Chhatrapati has raised is that the decree has been passed by consent of the two partners that appeared in the suit and he argues that the partners were not entitled to give such consent to the passing of the decree having regard to the provisions of S.19, sub-s.(2)(e), Indian Partnership Act.
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> We will assume for the present that the two partners were not clothed with authority to agree to a consent decree being passed in such suit. But if the plea is allowed to be raised in the present proceedings, it must necessarily lead to the result that the decree passed against the firm would not bind the appellants, and if that is so, the appellants'shares in the partnership properties would cease to be liable in execution.
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> That would be contrary to the provisions of R.50, sub-r.(1)(a). It would besides mean that two decrees would come into existence in respect of the same suit. In our opinion, such a result is wholly unreasonable and so the wider construction of the material words used in sub-r. (2) which leads to such a result must be rejected."

6. Exposition in this decision has been considered by the Apex Court in the case of **Gambhir Mal Pandiya V/s J.K. Jute Mills Co. Ltd., AIR 1963 SC 243.** In paragraph 8 of this decision, the Apex court has observed that it is clear that a plaintiff need sue only the firm, but if he wants to bind the partners individually he must serve them personally,

for which purpose he can get a discovery of the names of partners of the firm. It is then observed that partners may however, appear and plead that they are not partners and were not partners when the cause of action arose. While considering decision in the case of J.K.Jute Mills, the Apex Court observed that the law is thus not concerned with a fight between the partners inter se and an action between the partners is not to be tried within the action between the firm and the plaintiff. As mentioned earlier, the Apex Court after considering earlier decision of this court in paragraph-18 proceeded to uphold the view taken in **Rana Harkishandas case (supra)** that the only question that can be gone into in application for leave under order 21 Rule 50(2) is whether the person summoned as a partner to show cause was a partner at the material time or not. The Court has then accepted the view of this court that unless the plea on this point by the person summoned to show cause succeeded, leave cannot be withheld. In paragraph-19, The Supreme Court went on to observe that the view expressed by this court in the case **Harkishandas (Supra)** is the correct view. My attention has been drawn to another decision of this court reported in **AIR 1983 Bombay 286**. In paragraph-7 of this decision, the view expressed in

case of **Gambhir (Supra)** has been followed. It was argued that the Apex Court in **Gambhir's case(supra)** has observed that in a proper case it is open to oppose leave on the argument that the decree is not binding. The submission is clearly misreading of the principle expounded in the said decision.

7. In other words, the only question that needs to be addressed in the present chamber summons is: whether the respondent was partner of Shreenath Developer, a Registered partnership firm at the relevant time, when the suit transaction was entered into or when the cause of action had arisen. As is mentioned earlier, it is not in dispute that respondent was partner of the the said firm at all the material time. The claim of the respondent is of having resigned on 1st April, 2001. Except bare words of the respondent, there is nothing to support the fact that the respondent in fact or in law resigned or retired from the said firm. As mentioned earlier, there is no entry in the register maintained by the Registrar of Firms regarding the fact that respondent has resigned. There is also no public notice issued of the fact that respondent has resigned from the firm. In absence thereof, in law, on account of provisions of Section 32 of the

Partnership Act, the respondent would remain liable to third party.

8. Accordingly, the argument that no leave ought to be granted cannot be countenanced. Admittedly, it is not the case of the respondent that the consent decree was obtained by the plaintiffs fraudulently. No such case is pleaded or even suggested. The Respondent is none else but wife of the Judgment Debtor who is incidently partner in the firm. The argument that no execution would proceed against the respondent as the respondent was not party to the suit nor express consent has been obtained from the respondent before entering into Consent Terms need not burden this court. Those issues can be examined at the appropriate stage. For the present, suffice it to observe, as it has been established from the record that the respondent was partner of the Judgment debtor partnership firm at the relevant time, the relief claimed in terms of prayer clause (a) and (b) of the chamber summons will have to be granted.

9. Chamber summons No.1122 of 2005 is made absolute in terms prayer clause (a) and (b). Amendment to the execution application be carried out

within six weeks.

10. Chamber summons No.81 of 2005 is disposed of as not pressed.

11. Ordered accordingly.